

# Habits of a Highly Effective Transformative Mediation Program

PATRICIA L. FRANZ

## I. INTRODUCTION

In *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition*,<sup>1</sup> Robert A. Baruch Bush and Joseph P. Folger advocate the use of “transformative” mediation—a style or method of mediation that they describe as flowing from the premise of an interdependent social reality that demands both individual strength and relational skills.<sup>2</sup> The primary focus of the mediator practicing transformative mediation is not the resolution of a particular conflict. Instead, the mediator’s primary goal is to help parties live more effectively by teaching new attitudes and skills that can be put to use in the current dispute and in future situations.<sup>3</sup>

Bush and Folger argue that their work is a part of a larger trend away from the dominant Western “Individualist” worldview, which holds as its highest values individual autonomy and fulfillment, toward a “Relational” worldview, which holds as its highest value the integration of individual autonomy and concern for others.<sup>4</sup> Another recent work reflective of this trend is management consultant Stephen Covey’s bestseller, *The 7 Habits of Highly Effective People*,<sup>5</sup> which has found a wide audience among both business and political leaders.<sup>6</sup> Covey describes “habits” or skills designed both to increase self-confidence and to create stronger, more meaningful relationships with others.<sup>7</sup>

There are strong parallels between Covey’s habits and the desired outcomes of transformative mediation. As will be discussed in Part II.B.,

---

<sup>1</sup> ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994).

<sup>2</sup> See *id.* at 242–244.

<sup>3</sup> See *id.* at 84–95.

<sup>4</sup> See *id.* at 236–248.

<sup>5</sup> STEPHEN R. COVEY, *THE 7 HABITS OF HIGHLY EFFECTIVE PEOPLE* (1st Fireside ed., 1990).

<sup>6</sup> See *infra* Part II.B.

<sup>7</sup> See COVEY, *supra* note 5, at 60–62.

transformative mediation can be described as an attempt on the part of a mediator to teach several of Covey's seven habits.

Bush and Folger's advocacy of transformative mediation comes at a time of great controversy in the field of mediation over whether the primary emphasis in mediation should be outcome—the resolution of disputes—or process—the provision of a decisionmaking process that encourages parties to the dispute to exercise their own decisionmaking capabilities; Bush and Folger clearly support the process side of the debate.<sup>8</sup> Transformative mediation and similar process-oriented models of mediation have been criticized as, among other things, unresponsive to party expectations and market demands,<sup>9</sup> “presumptuous”<sup>10</sup> and even just too “far out.”<sup>11</sup>

Up to this point, the design of court-connected mediation programs has reflected an emphasis on outcome, specifically the efficient handling of the ever-increasing number of cases flooding the court system and the removal of those cases from court dockets via mediated settlement.<sup>12</sup> However, the widespread popularity of Covey's work indicates that a dispute resolution process which preserves, and even enhances, social relationships is an idea that is gaining legitimacy among policymakers and therefore cannot be

---

<sup>8</sup> See John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 839, 857 (1997).

<sup>9</sup> See Jeffrey W. Stempel, *Beyond Formalism and False Dichotomies: The Need for Institutionalizing a Flexible Concept of the Mediator's Role*, 24 FLA. ST. U. L. REV. 949, 973–975 (1997). Stempel argues that the current market demand for mediators who are willing to provide “evaluative” (i.e., outcome-oriented) rather than purely “facilitative” (i.e., process-oriented) services indicates that program planners should not “fight the market” by adopting an excessively formal commitment to the facilitative model of mediation. Using this same logic, one could argue that because most parties currently come to the legal system looking for resolution of a specific dispute, the appropriate response from the court system would be to focus primarily on helping the parties to resolve that dispute rather than attempting to transform the parties themselves.

<sup>10</sup> Carrie Menkel-Meadow, *The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices*, 11 NEGOTIATION J. 217, 236–237 (1995) (arguing that the model of mediation that Bush and Folger advocate is “no less manipulative or content-based” than the other models that they critique, the author asks “[w]ho are the ‘we’s’ that preside over this transformation?”).

<sup>11</sup> Lande, *supra* note 8, at 850–851 (noting that mediators who focus primarily on party autonomy in decisionmaking rather than upon directing parties toward settlement are often derisively described as “soft,” “touchy-feely” and “new-age”).

<sup>12</sup> See *id.* at 858.

easily dismissed without careful consideration.<sup>13</sup> As Professor Menkel-Meadow points out in her review of Bush and Folger's work, "the time is . . . ripe for new conceptualizations and theoretical attention to the role of mediation in our society."<sup>14</sup>

Given these trends—the "revival" of interest in mediation's transformative potential, the interest among business and political leaders in relationship-building management techniques such as Covey's and the active discourse in the mediation field concerning appropriate goals for mediation as a dispute resolution process—it becomes easier to imagine public sponsorship of an overtly process-oriented mediation style such as transformative mediation, perhaps even in the form of a court-connected transformative mediation program.<sup>15</sup>

If attempts are made to put transformative mediation into practice, careful attention should be given to the potential impact of both the adversarial culture of the court system in general<sup>16</sup> and the outcome-based orientation of current mediation practices upon the delivery of transformative mediation services. As Bush and Folger note, the institutional context in which mediation services are provided can either support or seriously undermine the relational goals of transformative mediation.<sup>17</sup> Similarly, Covey argues that values cannot thrive in a system that does not support them. For example, relational values cannot thrive in

---

<sup>13</sup> It should be noted that the idea of mediation as a transformative process is not new. In fact, the current interest in the transformative potential of mediation has been called a "revival" of the idea of mediation as the source of "empowerment"—a concept that fueled community-based mediation projects in the early years of the mediation movement. *See id.* at 858–859.

<sup>14</sup> Menkel-Meadow, *supra* note 10, at 241.

<sup>15</sup> Given the popularity of Covey's work, one can even imagine those seeking to gain public support for a transformative mediation program describing the program as a new approach to mediation based on principles underlying *The 7 Habits of Highly Effective People*.

<sup>16</sup> For discussion of the impact of the adversarial litigation culture on ADR practice and vice versa, see Lande, *supra* note 8, at 844–853, 879–890. *See also* Robert A. Baruch Bush, *Alternative Futures: Imagining How ADR May Affect the Court System in Coming Decades*, 15 REV. LITIG. 455 (1996); Carrie Menkel-Meadow, *Symposium: Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR,"* 19 FLA. ST. U. L. REV. 1 (1991).

<sup>17</sup> *See* BUSH & FOLGER, *supra* note 1, at 261–262.

a business, a family or any organization that rewards competitiveness over teamwork.<sup>18</sup>

This Note will discuss some of the many considerations involved in the design of a court-connected mediation program and how policy choices may support or undermine the provision of services that reflect the relational goals of transformative mediation. This Note begins with a brief overview of Bush and Folger's *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* and Covey's *The 7 Habits of Highly Effective People* and a discussion of the similarity in the authors' approaches to personal and interpersonal growth through negotiation and conflict resolution. The focus then shifts to specific decisions that must be made when designing a court-connected mediation program and suggestions for policies and practices that could potentially support the provision of mediation based on relational values.

## II. RELATIONAL PHILOSOPHIES IN MEDIATION AND BUSINESS

### A. *Transformative Mediation*

Bush and Folger approach mediation with the premise that conflicts need not be viewed as problems but can (and should be) viewed as opportunities for personal moral growth or transformation.<sup>19</sup> This moral transformation is an internal move from an individualistic orientation to a balanced concern for self and others.<sup>20</sup> It involves growth along two dimensions: (1) the self—"realizing and strengthening one's inherent human capacity for dealing with difficulties of all kinds by engaging in conscious and deliberate reflection, choice, and action"; and (2) the ability to relate to others—"realizing and strengthening one's inherent human capacity for experiencing and expressing concern and consideration for others, especially others whose situation is 'different' from one's own."<sup>21</sup> This strengthening of the self is termed "empowerment." The heightened willingness and ability to relate to others is termed "recognition."<sup>22</sup>

---

<sup>18</sup> See COVEY, *supra* note 5, at 205-206.

<sup>19</sup> See BUSH & FOLGER, *supra* note 1, at 81.

<sup>20</sup> See *id.*

<sup>21</sup> *Id.*

<sup>22</sup> See *id.* at 84-85.

## HABITS OF HIGHLY EFFECTIVE TRANSFORMATIVE MEDIATION

Bush and Folger argue that these opportunities for growth are often missed in “problem-solving” mediation styles which are the natural outgrowth of a problem-solving orientation to conflict.<sup>23</sup> The currently predominant problem-solving orientation views conflict as a problem of needs satisfaction. In other words, the “problem” presented by conflict is that of satisfying what appear to be incompatible needs.<sup>24</sup>

The corollary to this problem-solving orientation to conflict is the assumption that the desired response to conflict is to help parties resolve the incompatibility between individual needs or positions.<sup>25</sup> While problem resolution is seen as an admirable goal, Bush and Folger warn that the problem-solving orientation results in “directive”<sup>26</sup> mediation styles.<sup>27</sup> In directive mediation, mediators tend to ignore the interpersonal interaction of the parties in favor of pushing the parties to reach a solution to their conflict that the mediator views as good or fair.<sup>28</sup>

By focusing on problem-solving as its main goal, current mediation practice often results in an impasse when relational issues (e.g., unresolved feelings or suspicion) are not explicitly addressed by the parties with the support of the mediator.<sup>29</sup> Bush and Folger acknowledge that if a settlement

---

<sup>23</sup> See *id.* at 59.

<sup>24</sup> See *id.* at 56.

<sup>25</sup> See *id.*

<sup>26</sup> Directive mediation is described as a style of practice in which the mediator is willing to exert strong influence over the substantive outcome of a case by overtly encouraging parties to agree to a particular settlement or directing parties away from certain settlement terms. See *id.* at 37.

<sup>27</sup> For a thorough description of a mediation style based on the problem-solving orientation to conflict, see JOSEPH B. STULBERG, *TAKING CHARGE/MANAGING CONFLICT* (1987). As Stulberg describes it, the mediator’s job “is to get negotiating parties to agree to terms that resolve their dispute.” *Id.* at 31. Stulberg also discusses the mediator’s role in generating “movement”: “What gets someone to change her mind or agree to do something she had previously resisted doing? The mediator must be conscious of these leverage points and use them deliberately to generate movement toward resolution.” *Id.* at 95. See generally James J. Alfini, *Symposium: Trashing, Bashing, and Hashing it Out: Is This the End of “Good Mediation”?*, 19 FLA. ST. U. L. REV. 47 (1991) (discussing strongly directive mediation styles); Leonard L. Riskin, *Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOTIATION L. REV. 7 (1996) (discussing variations in mediation patterns).

<sup>28</sup> See BUSH & FOLGER, *supra* note 1, at 66.

<sup>29</sup> See *id.* at 68.

is reached via a directive, problem-solving approach, it may be more satisfying to parties than the options of lawyer-to-lawyer negotiation or trial. They argue, however, that such a settlement is likely to be far less satisfying to the parties than a solution that truly reflects choices made by the parties themselves.<sup>30</sup>

The prescription offered by Bush and Folger for the ills that they find in the problem-solving orientation is not a newer, better problem-solving technique. Instead, they advocate a move to an altogether new orientation to conflict and to mediation practice—the transformative orientation.<sup>31</sup> The transformative orientation to conflict views conflict as an opportunity for personal and interpersonal growth. This assumption leads to a style of mediation that focuses not on problem-solving per se, but on providing opportunities for growth that will allow the parties to make satisfying

---

If conflicts are viewed and approached from a problem-solving stance, the very basis for communicating at all is undermined when relational or identity issues arise. Mediators may try to recast these more elusive issues into problems that have tangible solutions. But if disputants resist or recasting appears impossible, mediators may see no alternative but to drop the issue or end the mediation entirely. Mediators' inclination to avoid or drop these dimensions of parties' problems is a sensible and expected response from a problem-solving point of view.

*Id.*

<sup>30</sup> See *id.* at 73.

Given the kinds of directive mediator practices that have been documented in research, it seems unlikely that the most common result of "successful" problem-solving mediation is satisfaction of parties' needs. Rather, it is probably a settlement that, even if optimal in the mediator's view (and even if it contributes to high settlement rates), leaves both parties unsatisfied or satisfies one at the expense [emotional or financial] of the other.

*Id.*

<sup>31</sup> See *id.* at 77, 81–82. Bush and Folger contrast the problem-solving and transformative orientations to conflict with the "distributive" orientation which underlies formal litigation and arbitration:

[The distributive] orientation views the sorting out of competing claims for resources as the central activity of conflict resolution. In the distributive view, conflict is defined as an adversarial, winner-take-all contest among competing claimants for resources. The ideal response to conflict is the assignment of contested resources to the party with the superior claim, according to principles of rights and fairness.

*Id.* at 57.

## HABITS OF HIGHLY EFFECTIVE TRANSFORMATIVE MEDIATION

choices—to agree, to disagree or to compromise—for themselves.<sup>32</sup> In other words, empowerment and recognition, rather than a settlement agreement, become the primary goals of mediation.<sup>33</sup>

This is not to say that transformative mediation does not deal directly with the parties' dispute or that settlement is discouraged. The approach does require, however, that the mediator focus on improving each participant's ability to participate in problem-solving, rather than on prompting the parties to settle in any specific way.<sup>34</sup> This means that the definition of a successful mediation session is broadened to include any movement on the parties' part in the ability to listen to the other's point-of-view (recognition) and to make considered choices based on their own needs in light of what they have heard the other say (empowerment).<sup>35</sup>

With its focus on personal and interpersonal growth, the transformative approach to mediation that Bush and Folger advocate is open to attack on several grounds, including inefficiency and impracticality.<sup>36</sup> They maintain, however, that there is likely to be less resistance than one might assume to a mediation style based on the presumption of human interrelatedness.<sup>37</sup> Bush and Folger propose that the interest that they and others around the country have in this new transformative mediation style is but a small part of a larger movement, across several fields of endeavor, from an Individualist to a Relational worldview.<sup>38</sup>

---

<sup>32</sup> See *id.* at 82–83.

In the transformative orientation, the ideal response to a conflict is not to solve 'the problem.' Instead, it is to *help transform* the individuals involved, in both dimensions of moral growth. . . . It means encouraging and helping the parties to use the conflict to realize and actualize their inherent capacities both for strength of self and for relating to others. . . . If this is done, then the response to conflict itself helps transform individuals from fearful, defensive, or self-centered beings into confident, responsive, and caring ones, ultimately transforming society as well.

*Id.*

<sup>33</sup> See *id.* at 84–85. See generally Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation*, 41 FLA. L. REV. 253 (1989).

<sup>34</sup> See BUSH & FOLGER, *supra* note 1, at 104–108.

<sup>35</sup> See *id.* at 95.

<sup>36</sup> See *id.* at 272–283; see also *supra* notes 9–11 and accompanying text.

<sup>37</sup> See BUSH & FOLGER, *supra* note 1, at 272.

<sup>38</sup> See *id.* at 253–259.

The Relational worldview, as they describe it, is a conceptual framework for interpreting human nature and society<sup>39</sup> that acknowledges the dual realities of human beings as individuals and as members of a larger social group.<sup>40</sup> It holds as its highest value "the achievement of human conduct that integrates strength of self and compassion toward others."<sup>41</sup> According to this Relational worldview, society is not a force that acts against individual interests, but is a medium for human relationships.<sup>42</sup> Social institutions, such as mediation programs, must go beyond the minimalist role that they are permitted by the Individualist worldview.<sup>43</sup> They should foster human relations by playing a supportive, educational role that serves not merely "to protect us from the worst in each other but also to help us find and enact the best in ourselves."<sup>44</sup>

According to Bush and Folger, this Relational worldview is emerging in many areas of study, including psychology, sociology, political philosophy and feminist legal theory.<sup>45</sup> They see this trend as an indication of an emergent shift from the current Individualistic worldview to a widespread Relational orientation:

[M]ost of these thinkers are quite explicit about the fact that their ideas are meant to express a new worldview that contrasts with the Individualist outlook. . . . The fact that elements of this worldview are being expressed

---

<sup>39</sup> See *id.* at 236.

<sup>40</sup> See *id.* at 242.

<sup>41</sup> *Id.* The Relational worldview is contrasted with the currently predominant Individualist worldview or "liberal individualism." The Individualist worldview is described as a conceptual framework that focuses on humans as unique individuals with capacities for self-knowledge, self-assertion and self-determination. Its highest value is realizing one's potential for individual fulfillment. This worldview sees society as a referee between individuals attempting to satisfy individual needs: "It has to protect persons from each other's trespasses, . . . but it also has to support everyone's efforts to do everything they can, short of trespassing on others, to pursue their own subjectively defined satisfaction. In short, it has to be both protective and facilitative, but not directive." *Id.* at 238.

<sup>42</sup> See *id.* at 244.

<sup>43</sup> See *id.*

<sup>44</sup> *Id.*

<sup>45</sup> See *id.* at 255.



similarly, across such a range of fields, signals the beginning of [a] paradigm shift, from the Individualist to the Relational worldview.<sup>46</sup>

## B. Transformative “Habits”

Though they do not cite his work, the widespread popularity of Stephen R. Covey’s 1989 book *The 7 Habits of Highly Effective People*<sup>47</sup> (*The 7 Habits*) supports Bush and Folger’s contention that both scholars and the public at large are ready to embrace a Relational worldview. In *The 7 Habits*, Covey, a management consultant and former Brigham Young University business professor,<sup>48</sup> describes seven skills that enhance navigation in a social reality in which individuals must cooperate with one another to achieve mutually beneficial goals.<sup>49</sup>

Briefly, the seven habits are: (1) Be Proactive—recognize and take responsibility for making things happen, and take responsibility for both the consequences of your actions and your response to those consequences;<sup>50</sup> (2) Begin With the End in Mind—before undertaking any task, develop a clear picture or idea of what result you want to accomplish so that you can

---

<sup>46</sup> *Id.* at 256. Some of the works cited as indicative of the trend toward a Relational worldview include ROBERT N. BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* (1985) (sociology); AMITAI ETZIONI, *THE SPIRIT OF COMMUNITY: RIGHTS, RESPONSIBILITIES, AND THE COMMUNITARIAN AGENDA* (1993) (sociology); CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT* (1982) (psychology); JAMES J. LYNCH, *THE LANGUAGE OF THE HEART: THE BODY’S RESPONSE TO HUMAN DIALOGUE* (1985) (medicine); MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982) (political philosophy); Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987) (feminist legal theory); Martha Minow, *Forward: Justice Engendered*, 101 HARV. L. REV. 10 (1987) (feminist legal theory); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988) (feminist legal theory). See also BUSH & FOLGER, *supra* note 1, at 255–256. For a discussion of the priority given to the healing of the relationship over the resolution of a specific problem in the Judeo-Christian tradition, see Andrew W. McThenia & Thomas L. Shaffer, *For Reconciliation*, 94 YALE L.J. 1660, 1666–1667 (1985).

<sup>47</sup> COVEY, *supra* note 5.

<sup>48</sup> See Julie Lawlor, *Clan of the ‘7 Habits,’* USA WEEKEND, Jan. 14, 1996, at 4. Covey holds a doctorate in education from Brigham Young and an MBA from Harvard. See *id.* at 5.

<sup>49</sup> See COVEY, *supra* note 5, at 48–52.

<sup>50</sup> See *id.* at 75, 90–91.

evaluate whether steps you are taking are truly in the right direction;<sup>51</sup> (3) Put First Things First—decide what your priorities are in all areas of life—family, work, social, spiritual, physical—and schedule time to work on those priorities rather than being acted upon by the pull of urgent activities;<sup>52</sup> (4) Think Win/Win—seek mutual benefit in all interactions with others;<sup>53</sup> (5) Seek First to Understand, Then to Be Understood—before trying to help, sell to, convince or otherwise communicate with another, take the time to understand the other's concerns and goals and only then share your own point-of-view;<sup>54</sup> (6) Synergize—communicate with an open heart and mind in order to generate creative ideas, plans and solutions;<sup>55</sup> and (7) Sharpen the Saw—take the time to take care of your own physical, emotional, social, mental and spiritual needs so that you will have the energy needed to perform your life roles (employee, parent, spouse, friend) effectively.<sup>56</sup>

The response to *The 7 Habits* can fairly be described as phenomenal. Subsequent to its publication in 1989, *The 7 Habits* spent 250 weeks on the New York Times best seller list.<sup>57</sup> It has been translated into 27 languages<sup>58</sup> and is sold in 40 countries<sup>59</sup> with estimated *daily* sales of 15,000 copies.<sup>60</sup> Both business and political leaders have responded to Covey's ideas. His management consulting firm's client list includes over half of the Fortune 500 companies,<sup>61</sup> including AT&T, Dow Chemical,

---

<sup>51</sup> See *id.* at 98.

<sup>52</sup> See *id.* at 151–172.

<sup>53</sup> See *id.* at 207.

<sup>54</sup> See *id.* at 236–255.

<sup>55</sup> See *id.* at 262–265.

<sup>56</sup> See *id.* at 287–289.

<sup>57</sup> See Jim Clark, *The Time 25*, TIME, June 17, 1996, at 64.

<sup>58</sup> See Jan O. Spalding, *Team Building Can Be Habit-Forming*, TRIB. BUS. WKLY., Oct. 21, 1996, at 1.

<sup>59</sup> See Patricia Buhler, *Becoming More Effective—Lessons From Covey*, SUPERVISION, July 1, 1996, at 24.

<sup>60</sup> See Spalding, *supra* note 58, at 1. Covey's management consulting firm, the Covey Leadership Center in Provo, Utah, founded in 1986 with a staff of two, currently employs 700 people and has annual revenues exceeding \$70 million. See *Confessor to the Boardroom*, THE ECONOMIST, Feb. 24, 1996, at 74 [hereinafter *Confessor*]. In 1995, more than 250,000 people attended 7 *Habits* seminars facilitated by Leadership Center consultants. See Buhler, *supra* note 59, at 24.

<sup>61</sup> See *Confessor*, *supra* note 60, at 74.

Merck and Ford.<sup>62</sup> Subsequent to the 1994 congressional elections, Covey attended a meeting at Camp David by invitation of President Clinton and also met with House Speaker Newt Gingrich, who made *The 7 Habits* recommended reading for the new Republican House.<sup>63</sup>

Like Bush and Folger, Covey's ideas flow from the premise of social interdependence: "As we continue to grow and mature, we become increasingly aware that . . . the higher reaches of our nature have to do with our relationships with others—that human life is . . . interdependent."<sup>64</sup>

This view of social functioning has an important corollary in Covey's definition of emotional maturity.<sup>65</sup> In a social context of interrelatedness, full emotional maturity cannot be equated with independence.<sup>66</sup> Instead, maturity is defined as "the balance between courage and consideration" or the ability to express one's own feelings and convictions balanced with consideration for the thoughts and feelings of others.<sup>67</sup> That is, maturity is defined as interdependence.<sup>68</sup> An interdependent individual has a strong, independent sense of self, yet recognizes the value of interaction with others.<sup>69</sup>

These assumptions about an interdependent social reality and the resultant definition of maturity are reflected in the habits Covey categorizes as "public victories"—those habits prescribed to enhance communication

---

<sup>62</sup> See Buhler, *supra* note 59, at 24.

<sup>63</sup> See *The Clintons' Eclectic World*, NEWSWEEK, July 8, 1996, at 34–35.

<sup>64</sup> COVEY, *supra* note 5, at 49.

<sup>65</sup> See *id.*

<sup>66</sup> See *id.* at 50. Covey argues that as individuals, we grow from dependency on caregivers to emotional and financial independence. However, the story does not, and should not, end there. While independence is an improvement over dependence and is a necessary step on the path to emotional maturity, it stops short of providing the skills necessary to live in a world where the ability to achieve goals and be a productive citizen is dependent upon the ability to work cooperatively with others. See *id.* at 49–51.

<sup>67</sup> *Id.* at 217.

<sup>68</sup> See *id.* at 51.

<sup>69</sup> See *id.* Covey writes:

If I am emotionally interdependent, I derive a great sense of worth within myself, but I also recognize the need for love, for giving, and for receiving love from others. If I am intellectually interdependent, I realize that I need the best thinking of other people to join with my own.

and cooperation.<sup>70</sup> These include Habits 4, 5 and 6—Think Win/Win; Seek First to Understand, Then to Be Understood; and Synergize.<sup>71</sup> Covey describes Win/Win thinking not as a technique, but as an attitude that seeks mutual benefit in all human interactions, including conflict situations: “Win/Win is a belief in the Third Alternative. It’s not your way or my way; it’s a *better* way, a higher way.”<sup>72</sup>

True Win/Win communication leads to “synergistic” solutions. Synergistic solutions are creative decisions or plans that are more satisfying to each person involved than the solutions that each party brought to the table originally.<sup>73</sup> Covey argues that synergistic communication is most likely to take place when individuals seeking solutions are willing to go for a higher level of Win/Win, an attitude he terms “Win/Win or No Deal.”<sup>74</sup> This attitude is simply one that accepts the possibility of disagreeing agreeably:

*No Deal* basically means that if we can’t find a solution that would benefit us both, we agree to disagree agreeably—No Deal. No expectations have been created, no performance contracts established. I don’t hire you or we don’t take on a particular assignment together because it’s obvious that our values or our goals are going in opposite directions. It is so much better to realize this up front instead of downstream when expectations have been created and both parties have been disillusioned.<sup>75</sup>

Covey argues that the No Deal option is the only way to insure true Win/Win communication because it offers a graceful exit when negotiations stall at a point where all of the solutions generated benefit one person to the dissatisfaction of the other.<sup>76</sup> Thus, it allows the parties to relax and be more open to creative options: “When you have No Deal as an option in your mind, you feel liberated because you have no need to manipulate

---

<sup>70</sup> See *id.*

<sup>71</sup> See *id.*

<sup>72</sup> *Id.* at 207. Win/Win is distinguished from compromise, which while mature and respectful, does not generate creative solutions: “Compromise means that  $1 + 1 = 1\frac{1}{2}$ . Both give and take. . . . But it [communication] isn’t creative or synergistic. It produces a low form of Win/Win.” *Id.* at 271.

<sup>73</sup> See *id.* at 262–263.

<sup>74</sup> *Id.* at 213.

<sup>75</sup> *Id.*

<sup>76</sup> See *id.* at 213–214.

## HABITS OF HIGHLY EFFECTIVE TRANSFORMATIVE MEDIATION

people, to push your own agenda, to drive for what you want. You can be open. You can really try to understand the deeper issues underlying the positions.”<sup>77</sup>

In Covey’s model, to effectively translate the Win/Win or No Deal attitude into action, one must practice Habit 5—Seek First to Understand and Then to Be Understood.<sup>78</sup> This is the practice of listening, not for the usual purpose of formulating a response or retort, but to learn as much as possible about the other’s point-of-view.<sup>79</sup> This is “empathic” listening, a type of listening that “gets inside another person’s frame of reference.”<sup>80</sup> Not only does this type of listening allow for interaction based on accurate information about the other’s needs and concerns, it also lowers the other’s defensiveness by providing “psychological air.”<sup>81</sup> That is, it helps one to relax and open up to another’s point-of-view by satisfying one’s natural need to be heard and understood.<sup>82</sup>

There are obvious parallels between Covey’s habits and the twin goals of Bush and Folger’s transformative mediation—empowerment and recognition. Covey categorizes his first three habits—(1) Be Proactive, (2) Begin With the End in Mind and (3) Put First Things First—as “private victories.”<sup>83</sup> Private victories involve self-mastery.<sup>84</sup> They move a person from dependence to independence thereby setting the stage for effective

---

<sup>77</sup> *Id.* at 213.

<sup>78</sup> *See id.* at 236–260.

<sup>79</sup> *See id.* at 240.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 241.

<sup>82</sup> *See id.* Covey writes:

If all the air were suddenly sucked out of the room you’re in right now, what would happen to your interest in this book? You wouldn’t care about the book; you wouldn’t care about anything except for getting air. Survival would be your only motivation. . . . But now that you have air, it doesn’t motivate you. . . . *Satisfied needs do not motivate.* It’s only the unsatisfied need that motivates. Next to physical survival, the greatest need of a human being is psychological survival—to be understood, to be affirmed, to be validated, to be appreciated. . . . When you listen with empathy to another person, you give that person psychological air. And after that vital need is met, you can then focus on influencing or problem solving.

*Id.*

<sup>83</sup> *Id.* at 51.

<sup>84</sup> *See id.*

interdependence.<sup>85</sup> In their focus on growth and strengthening of the independent self, the goals of these first three habits are strikingly similar to transformative mediation's goal of empowerment—"realizing and strengthening one's inherent human capacity for dealing with difficulties of all kinds by engaging in conscious and deliberate reflection, choice and action."<sup>86</sup> The parallel is especially strong between empowerment and Habit 1—Be Proactive—recognize and take responsibility for making things happen, and take responsibility for both the consequences of your actions and your response to those consequences.<sup>87</sup>

Covey's next three habits—(4) Think Win/Win; (5) Seek First to Understand, Then to Be Understood; and (6) Synergize—are termed public victories.<sup>88</sup> The goal of the public victory habits is to "discover and unleash both the desire and the resources to heal and rebuild important relationships that have deteriorated, or even broken."<sup>89</sup> Public victories allow for more effective interaction with others<sup>90</sup> and thus serve the same purpose as Bush and Folger's transformative goal of recognition—"realizing and strengthening one's inherent human capacity for experiencing and expressing concern and consideration for others, especially others whose situation is 'different' from one's own."<sup>91</sup> In fact, the parallels between Covey's habits and the goals of transformative mediation are so strong that the latter's goals of empowerment and recognition can be seen as an attempt on the part of a transformative mediator to experientially teach Covey's habits, specifically Habit 1—Be Proactive; Habit 4—Think Win/Win; Habit 5—Seek First to Understand, Then to be Understood; and Habit 6—Synergize.

### III. PUTTING TRANSFORMATIVE MEDIATION INTO PRACTICE

Covey argues that for Win/Win thinking (or any value) to survive in an organization, that organization's systems—training, planning, communications, budgeting, compensation—must support and promote that

---

<sup>85</sup> *See id.*

<sup>86</sup> BUSH & FOLGER, *supra* note 1, at 81.

<sup>87</sup> *See* COVEY, *supra* note 5, at 75, 90–91.

<sup>88</sup> *See id.* at 51.

<sup>89</sup> *Id.* at 61.

<sup>90</sup> *See id.*

<sup>91</sup> BUSH & FOLGER, *supra* note 1, at 81.

value.<sup>92</sup> He tells the story of one of his clients, a company president, who complained that despite his best efforts to encourage his employees to cooperate with one another, they remained defensive and unwilling to cooperate. As part of his efforts to motivate his managers, the president had placed a chart on his office wall depicting a horse race, with the face of one of his managers superimposed over the head of each horse. At the end of the track was a travel poster of Bermuda. During weekly staff meetings, the president had stressed the need for teamwork, but concluded each meeting by displaying the chart and asking, "Now which one of you is going to win the trip to Bermuda?" He talked cooperation, but the compensation system rewarded competition. The result was competition.<sup>93</sup>

Management systems generate the behavior that they reward.<sup>94</sup> The institutional context in which mediation is practiced can likewise impact mediator and party behavior by generating "expectations about what mediation can and should accomplish."<sup>95</sup> Thus, for a transformative style of mediation to survive and thrive, the program in which transformative mediators practice their skills must be designed from beginning to end, from goals to evaluation, to support transformative values.

In their treatise, *Mediation: Law, Policy & Practice*, Nancy H. Rogers and Craig A. McEwen outline a series of policy decisions that must be made when designing a public mediation program.<sup>96</sup> What follows is a discussion of the implications of some of the major decision points outlined by Rogers and McEwen and recommendations for policy choices supportive of transformative mediation in a court-sponsored mediation program.

---

<sup>92</sup> See COVEY, *supra* note 5, at 206.

<sup>93</sup> See *id.* at 205–206.

<sup>94</sup> See *id.* at 229.

<sup>95</sup> BUSH & FOLGER, *supra* note 1, at 262. For a general discussion of the issues that arise as mediation theory is put into practice, see Menkel-Meadow, *supra* note 10 (discussing the ways in which the ADR movement has been impacted via assimilation into the "adversarial culture" of the court system); Panel Discussion, *What Happens When Mediation is Institutionalized?: To the Parties, Practitioners, and Host Institutions*, 9 OHIO ST. J. ON DISP. RESOL. 307 (1994) (conducting a panel discussion (Robert Baruch Bush served as a panel member) at a program of the Alternative Dispute Resolution Section of the Association of American Law Schools).

<sup>96</sup> See NANCY H. ROGERS & CRAIG A. MCEWEN, *MEDIATION: LAW, POLICY & PRACTICE* §§ 6:01–6:19 (2d ed. 1994).

### A. *Setting Program Goals*

Clear goals are the key to success in any endeavor. Covey stresses the importance of beginning "with the end in mind."<sup>97</sup> Because all things are created twice—first mentally and second physically or actively—successful activity begins with a clear picture or enunciation of the desired outcome.<sup>98</sup> Goals are the destination point on the "map" of any undertaking.<sup>99</sup> Without a clear destination in mind, it is impossible to recognize and avoid missteps and wrong turns.<sup>100</sup> Clear goals pull people and organizations strongly in the right direction, encouraging behavior that is goal-congruent and discouraging decisions that lead away from goal attainment.<sup>101</sup>

The goals for current mediation programs are implicit in the purpose clauses of, or preambles to, mediation statutes which often make claims regarding the effectiveness of mediation.<sup>102</sup> These statutes describe "effectiveness" principally in terms of increased settlement rates, cost savings for courts, decreased court delays, cost savings for parties and improved party relationships.<sup>103</sup> When these effectiveness claims are held up as the purpose behind the creation and funding of a mediation program, they become the de facto goals for the program, for its mediators and the parties who present disputes.

Such goals clearly reflect and support the problem-solving orientation to conflict and mediation. If conflict is seen as a problem in needs satisfaction only, then the appropriate response is to attempt to solve the conflict quickly with as little expenditure of public and private funds as possible, while at the same time giving some attention to party satisfaction.<sup>104</sup> These same goals would, however, be destructive in the context of a transformative mediation program.

Bush and Folger argue that the key problem with problem-solving mediation is mediator directiveness.<sup>105</sup> The focus on the goal of efficient

---

<sup>97</sup> COVEY, *supra* note 5, at 98.

<sup>98</sup> *See id.* at 98–99.

<sup>99</sup> *See id.* at 100.

<sup>100</sup> *See id.*

<sup>101</sup> *See id.* at 101–103.

<sup>102</sup> *See* ROGERS & MCEWEN, *supra* note 96, § 2:03.

<sup>103</sup> *See id.*

<sup>104</sup> *See* BUSH & FOLGER, *supra* note 1, at 56.

<sup>105</sup> *See id.* at 68–75. Directive mediation is described as a style of practice in



## HABITS OF HIGHLY EFFECTIVE TRANSFORMATIVE MEDIATION

dispute resolution inevitably takes the mediator's focus away from the self-determined satisfaction of the parties and leads the mediator to use directive techniques.<sup>106</sup> This directiveness tends to produce settlements that satisfy each party only partially or that satisfy one party at the expense of the other.<sup>107</sup>

To support a transformative mediation program, the goals, as expressed in enabling legislation, program policies, mediator training manuals and public education materials, must be explicitly transformative. The goal statement must focus on the twin goals of empowerment—party experience of a strengthened sense of self-worth and ability to deal with current and future difficulties<sup>108</sup>—and recognition—party demonstration of an increased ability and willingness to acknowledge the other party's situation and point-of-view.<sup>109</sup>

Because the hope is that mediation will eventually lead to a diminution of conflict, it would be tempting to combine the goals of problem-solving mediation with those of the transformative model, drafting a goal statement that calls for party empowerment and recognition in the context of efficient dispute resolution. However, such an approach would send out a powerful mixed message to mediators that is likely to be heard as, "Help the parties grow, but be quick about it." Such a message would likely lead to more focus on party self-determination than is seen in current mediation practice, but would still create a strong incentive for mediators to abandon non-directive approaches in favor of convincing the parties to settle when an apparent impasse is reached.<sup>110</sup>

---

which the mediator is willing to exert strong influence over the substantive outcome of a case by overtly encouraging parties to agree to a particular settlement or directing parties away from certain settlement terms. *See id.* at 37.

<sup>106</sup> *See id.* at 69–70.

<sup>107</sup> *See id.* at 73.

<sup>108</sup> *See id.* at 84.

<sup>109</sup> *See id.* at 85.

<sup>110</sup> *See id.* at 108–111. This is not to suggest that cost issues should be ignored by program designers, evaluators or policymakers. At some point costs will outweigh benefits for even the highest quality mediation program. This is to suggest, however, that in an attempt to support a process-oriented style of mediation such as transformative mediation in an institutional context that is accustomed to the efficiency claims of outcome-oriented mediation programs, it may be important to consciously and consistently subordinate short-term efficiency goals (such as lower costs per case and lightened court dockets) in favor of stressing the potential long-term public benefits of a mediation program designed to teach conflict resolution skills.

As discussed above, truly creative thinking or synergy is best fostered by a "Win/Win or No Deal" attitude, an approach that liberates creativity by removing the pressure to make a deal or solve a problem.<sup>111</sup> In order to let go of directive techniques that push parties to resolve a particular problem and instead focus on the parties' interaction, in fostering empowerment and recognition, mediators too must have a Win/Win or No Deal attitude. That is, transformative mediators must let go of the idea of a "settlement" or "resolution" at the end of one or more mediation sessions in order to focus effectively on party self-determination and growth.

A key to the successful implementation of a true transformative mediation program is a goal statement<sup>112</sup> that supports its mediators in the process of letting go of directiveness. Thus, an effective transformative mediation program must start with a goal or "mission" statement that sends a clear message regarding the transformative role of mediation. Such a statement might read:

Conflict is an opportunity for personal growth and a better understanding of others. Our purpose is to support those in conflict by fostering Empowerment—a heightened sense of self-worth and ability to manage and learn from this and future conflicts—and Recognition—the willingness and ability to recognize and acknowledge the situation and point-of-view of the other party to conflict.<sup>113</sup>

The power and responsibility for solving the dispute which parties bring to mediation lies with the parties themselves. We will aid in the process of creative thinking concerning the dispute. We will support and encourage the processes of empowerment and recognition and support parties in the process of deciding upon any agreements reached or future steps that will be taken in order to resolve the dispute in a manner satisfying to both parties.

### *B. Selecting Cases for Mediation*

Once the goals of a transformative mediation program are clearly articulated, planners must determine which cases should be referred to

---

<sup>111</sup> See COVEY, *supra* note 5, at 213; *supra* Part II.B.

<sup>112</sup> See COVEY, *supra* note 5, at 106–109.

<sup>113</sup> *Id.* at 84–85.

## HABITS OF HIGHLY EFFECTIVE TRANSFORMATIVE MEDIATION

mediation. There are two general approaches to this decision: the pragmatic approach and the social benefit approach (also known as the quality of justice approach).<sup>114</sup>

The pragmatic approach seeks to increase efficiency for courts and for parties by referring to mediation those cases that are most likely to settle in mediation.<sup>115</sup> This is sometimes attempted according to the type of dispute (e.g., domestic or contract cases) or by specific characteristics of the dispute (e.g., cases involving problems for which there are many solutions, but no clear legal principles for deciding among them).<sup>116</sup> Unfortunately, there is little agreement among commentators and little research to indicate which dispute categories or characteristics dispose a particular conflict to successful resolution via mediation.<sup>117</sup>

The social benefit approach seeks to refer to mediation those types of disputes where both parties and nonparties would benefit from a cooperative, nonadversarial resolution of disputes.<sup>118</sup> This approach downplays court efficiency goals in favor of a focus on the broader long-term benefit to parties and affected third parties.<sup>119</sup> Examples of this focus include statutes that call for collective bargaining to prevent work stoppages and domestic court programs that require mediation in domestic cases involving minor children.<sup>120</sup>

The transformative approach to mediation seeks to unleash the creative problem-solving capabilities of disputing parties by taking the focus away from the need to settle the dispute during a mediation session. Thus, it would be inconsistent to take a pragmatic approach to case selection, assigning to the program those cases that are most likely to settle. The transformative goal of party growth in the areas of empowerment and recognition dictates that mediation resources are best directed to disputes in which the parties are likely to benefit from such growth.

While it is arguable that any party to any dispute could benefit from an experience that fosters both personal and interpersonal growth, the resources that can be directed to any mediation program are finite.

---

<sup>114</sup> See ROGERS & MCEWEN, *supra* note 96, § 6:03.

<sup>115</sup> See *id.*

<sup>116</sup> See *id.*

<sup>117</sup> See *id.*

<sup>118</sup> See *id.*

<sup>119</sup> See *id.*

<sup>120</sup> See *id.*

Therefore, to gain support for a program with transformative goals, program advocates are likely to meet with the most success in justifying the expenditure of resources on a non-settlement-driven program by convincing those making funding decisions that both the parties and other socially-supported continuing relationships will benefit from such an approach. It would likely be easiest to make this argument for domestic relations cases in which custody, visitation and support of minor children are involved. Legislators have already demonstrated support for programs that decrease acrimony between divorcing parents in an attempt to provide a more stable post-divorce environment for children.<sup>121</sup> Examples of other cases where social benefits of decreasing post-resolution acrimony are likely to merit recognition and funding support include employee-employer disputes, business contract disputes and tort claims between neighbors.

Beyond child custody cases, it is difficult to determine which generic case types would fit a given selection criteria, even one as broad as the preservation and enhancement of socially beneficial relationships. Not every contract or tort claim involves an ongoing relationship. The social benefit of submitting a tort claim stemming from an auto accident between unrelated drivers to transformative mediation rather than the usual route of negotiation between insurance company lawyers is much less apparent than the benefit of transformative mediation in tort claims involving neighbors. Therefore, referral of cases to a transformative mediation program is likely to be most effective if performed on a case-by-case basis (upon review of pleadings) rather than on a categorical basis.<sup>122</sup>

While there is general support for referral of domestic relations cases to mediation programs, there is concern regarding the appropriateness of mediation in cases where there are reports of domestic violence.<sup>123</sup> The flexibility and informality of mediation has led some commentators to argue that where bargaining imbalances exist between parties, the lack of formal procedural rules and the lessened reliance on substantive law result in unfair outcomes for the "weaker" party.<sup>124</sup> Some commentators have

---

<sup>121</sup> See *id.*

<sup>122</sup> For a discussion of the possible role of the court system in managing the utilization of various ADR techniques, see Bush, *supra* note 16, at 457-460.

<sup>123</sup> See *id.*

<sup>124</sup> See ROGERS & MCEWEN, *supra* note 96, § 2:07; see also Margaret F. Brining, *Does Mediation Systematically Disadvantage Women?*, 2 WM. & MARY J. WOMEN & L. 1 (1995); Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545

## HABITS OF HIGHLY EFFECTIVE TRANSFORMATIVE MEDIATION

argued that power imbalances are especially harmful to women as they attempt to mediate fair property and child support settlements during divorce mediation.<sup>125</sup> A special area of concern in this regard is domestic violence. In response to concerns regarding the potential power imbalances created by the victim's fear of her attacker and her eroded self-esteem, many mediation programs allow for exclusion of cases where domestic violence is alleged.<sup>126</sup>

Other commentators argue that mediation has the potential to provide more appropriate recourse for women generally, and for victims of domestic violence in particular.<sup>127</sup> Given the single option of resolving disputes with their abusers through adversarial (and often criminal) proceedings, many victims choose not to pursue their rights for various reasons including fear of retaliation, loss of hope for healing the relationship and a desire to avoid disclosure of the abuse in a public forum.<sup>128</sup>

Because of its nondirective nature<sup>129</sup> and its focus on party empowerment and recognition, transformative mediation has the potential

---

(1991).

<sup>125</sup> See ROGERS & McEWEN, *supra* note 96, § 2:07; see, e.g., Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441 (1992). But see Jessica Pearson, *The Equity of Mediated Divorce Agreements*, 9 MEDIATION Q. 179, 192–193 (1991) (overviewing research suggesting that parties which settle via mediation do not view agreements as any less equitable than those reached via adversarial or independent dispute resolution processes, and arguing that mediation does not appear to either protect or harm women financially following divorce).

<sup>126</sup> See ROGERS & McEWEN, *supra* note 96, § 6:03.

<sup>127</sup> See Becky Hoover Hernstein, *Women and Mediation: A Chance to Speak and to Be Heard*, 13 MEDIATION Q. 229, 230–231 (1996). See generally Diane Neumann, *How Mediation Can Effectively Address the Male-Female Power Imbalance in Divorce*, 9 MEDIATION Q. 227 (1991).

<sup>128</sup> See Hernstein, *supra* note 127, at 235–236.

<sup>129</sup> Bush and Folger point out that the goal of nondirectiveness should not be confused with mediator passivity, especially when presented with a potential bargaining imbalance between the parties:

In some cases parties do lack capacity for decision making, and if the mediator does not recognize this and discontinue the process, empowerment and recognition are both at great risk. Perhaps the most important example is when one party is the victim of past violence by the other. In this case, fear of future harm may negate that party's capacity to engage in genuine deliberation and decision making on issues involving the abuser even if the party is otherwise completely competent.

to give victims of domestic violence a voice and serves as an initial step on the path from victim to survivor of domestic violence.<sup>130</sup> Likewise, the transformative approach can serve as an opportunity for the aggressor to more clearly understand the consequences of violent behavior and begin to feel empowered to take more appropriate actions during conflict situations.

In a transformative mediation setting the concept of party self-determination begins with the decision to participate in, or to forego, mediation.<sup>131</sup> For a victim of domestic violence, the process of attending an orientation session, learning about mediation's purpose and procedures and about other dispute resolution options, thinking through what she has learned, discussing her concerns with her attorney or a domestic violence counselor and then making a well-informed decision to mediate or to pursue other legal remedies is a potentially empowering experience. These steps offer the opportunity to develop a renewed sense of self-worth and to develop, or reconnect with, the ability to deal with current and future conflict.<sup>132</sup>

Another potentially empowering experience early in the transformative mediation process stems from the practice of allowing the parties, rather than the mediator, to determine who will participate in the mediation sessions.<sup>133</sup> If a victim feels that she would be able to participate in sessions with her abusive partner if she were accompanied by her attorney<sup>134</sup> or

---

The pitfall is that, because of the supposed importance of leaving choices up to the parties, a mediator may feel reluctant to raise questions about capacity when the parties have not and they seem willing to proceed.

Avoiding this pitfall means that, if something suggests the element of violence and fear, the mediator needs at the very least to pursue this question in depth with the possible victim party and not proceed unless satisfied that nothing has occurred to negate that party's capacity for free decision making.

BUSH & FOLGER, *supra* note 1, at 215. This suggests that a necessary element of mediator training is instruction in the dynamics, signs and symptoms of domestic violence and post-traumatic stress disorder.

<sup>130</sup> See Hernstein, *supra* note 127, at 236.

<sup>131</sup> See BUSH & FOLGER, *supra* note 1, at 142-143.

<sup>132</sup> See *id.* at 84.

<sup>133</sup> See *id.* at 115-116; *infra* Part III.E.

<sup>134</sup> See Craig A. McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1375-1376 (1995) (arguing that attorney participation in mediation sessions is the most effective method of ensuring fairness). For a discussion of potential problems stemming from the attorney participation in mediation, see Lande, *supra* note 8, at 879-891

perhaps by a counselor trained in the dynamics of abuse, she could insist on the participation of one or more support persons and decline to participate in mediation sessions if her partner does not agree. In a transformative mediation setting, the decision to withdraw from participation at any time during the process would be supported by the nondirective style of the mediator and reinforce for the victim that she does have the power to make choices regarding her situation. Because of the potential for transformative mediation to have a powerful impact on the self-concept and behavior of both victim and abuser, transformative mediation program planners should seriously consider adopting a policy of encouraging (or not discouraging) participation by parties dealing with domestic violence and by other parties where a power imbalance presents an opportunity for empowerment and recognition.

### *C. Voluntary vs. Mandatory Participation*

The question of whether participation in a court-sponsored mediation program should be voluntary or mandatory for certain types of cases (referred to mediation by category or case-by-case basis) is one of the most hotly debated issues in the mediation field.<sup>135</sup> Many of those who advocate voluntary participation in mediation programs do so on philosophical grounds, pointing to what they see as a fundamental conflict between mediation's ideal of party-determined outcomes and forced participation.<sup>136</sup> Along these lines, concerns have been expressed that parties participating in mandatory mediation programs may feel pressured into accepting undesirable settlement terms, especially in situations where mediators make recommendations to the court regarding resolution when the parties themselves do not reach agreement.<sup>137</sup>

Proponents of mandatory mediation support it for reasons largely based on efficiency grounds.<sup>138</sup> Mandatory mediation is more likely to generate a

---

(noting that the participation of lawyers in mediation may reduce the quality of the parties' consent unless mediators are able to handle the time pressures generated by lawyers' hourly fees and tight schedules).

<sup>135</sup> See ROGERS & MCEWEN, *supra* note 96, § 6:04.

<sup>136</sup> See *id.*

<sup>137</sup> See *id.*

<sup>138</sup> See *id.*

case volume large enough to lighten the court's caseload, thereby justifying the costs of a mediation program.<sup>139</sup>

Given the strong emphasis on party self-determination in transformative mediation and the absence of efficiency claims in the recommended goal statement, it is tempting to insist with little reflection that participation in transformative mediation should be completely voluntary. As discussed above, a key to creative conflict resolution is a "Win/Win or No Deal" attitude on the part of the parties.<sup>140</sup> If parties are to participate with this liberating attitude, they must not feel coerced into settling or even participating in mediation. To prevent actual or perceived coercion, parties should be free to withdraw from mediation at any time and would ideally have ready access to other ADR options, such as med-arb, as well as standard adversarial options such as lawyer-to-lawyer negotiation and trial.<sup>141</sup>

This emphasis on party control does not, however, dictate the conclusion that there is a fundamental conflict between transformative mediation and some level of mandatory participation. As noted above, Bush and Folger argue that the concept of transformative mediation flows from a Relational worldview which holds that social institutions should not function as mere "referees" between people seeking to attain individual goals, but should instead take a more active educative and supportive role in helping individuals grow both personally and interpersonally.<sup>142</sup> Consistent with this Relational, or "communitarian," view of the role of social institutions, transformative mediation program planners should consider use of some level of mandatory participation in support of its necessary educational component. Mandated participation in mediation

---

<sup>139</sup> See *id.*

<sup>140</sup> See COVEY, *supra* note 5, at 213.

<sup>141</sup> See BUSH & FOLGER, *supra* note 1, at 282-283.

[M]aking mediation practice transformative makes accessibility to arbitration, adjudication, and other more protective and authoritative processes all the more important. If transformative mediation ends in impasse, whether because of rejected opportunities for empowerment and recognition or because of real external limitations on the parties, the parties must indeed have some place to turn for the "bottom line"—a decision on how to put an end to their dispute.

*Id.* at 283; see also McThenia & Shaffer, *supra* note 46, at 1666 (discussing a similar progression from the use of party-determined reconciliation whenever possible to use of imposed judgments when necessary in the Judeo-Christian tradition).

<sup>142</sup> See *supra* notes 41-43 and accompanying text.



## HABITS OF HIGHLY EFFECTIVE TRANSFORMATIVE MEDIATION

would provide opportunities to educate both lawyers and disputants, who may not have otherwise chosen to participate, about the process and potential benefits of mediation.<sup>143</sup> Mandating mediation also sends a strong message from the court system to the public concerning the desirability of non-adversarial conflict resolution.<sup>144</sup>

A transformative mediation program could take advantage of these social benefits consistently with its emphasis on party self-determination by mandating only some minimal level of participation. The requirement might be, for example, that parties attend an informational session (a regularly scheduled group meeting attended by all potential program clients, describing the program's purpose and procedures in general terms) and a brief meeting between a mediator and the primary parties to a specific dispute (to discuss the applicability of mediation in the particular dispute) as a prerequisite for access to other dispute resolution options.<sup>145</sup> This requirement would serve to educate parties about the option of mediation and would provide a potentially empowering experience, even for those parties who choose not to participate, by assisting them as they think through options for dealing with the dispute and supporting them in their decision to choose mediation or another dispute resolution process.

### D. *Timing*

Where there is a mandatory mediation requirement, program planners must decide how the timing of mandated mediation will fit in with other steps in the litigation process.<sup>146</sup> Program policy may leave timing largely to the discretion of the parties, it may require that mediation take place soon after responsive pleadings are filed in order to prevent a hardening of the parties' positions and accumulation of legal costs, or it may set mediation for later in the discovery phase so that mediation can proceed based on information garnered by that process.<sup>147</sup>

As suggested in Part III.C above, participation in a transformative mediation program should be mandated to the extent of requiring parties to learn about the potential benefits of the program, perhaps through

---

<sup>143</sup> See ROGERS & MCEWEN, *supra* note 96, § 6:04.

<sup>144</sup> See *id.*

<sup>145</sup> This requirement would only apply to parties whose cases have been identified as appropriate for mediation.

<sup>146</sup> See ROGERS & MCEWEN, *supra* note 96, § 6:05.

<sup>147</sup> See *id.*

attendance at a group informational session and a brief meeting with a program mediator. Those parties choosing to participate in mediation, whether that choice is made at the initial meeting or at a later time, should be free to decide at what point in the litigation process they wish to schedule mediation sessions. Allowing parties to choose whether and when to participate in mediation is consistent with transformative mediation's focus on party self-determination.

Program planners should, however, consider mandated timing for the initial group informational session and meeting with a mediator. The two primary goals of the information session and meeting would be (1) to inform the parties about the mediation option and (2) to provide an empowering experience as parties are supported in the decisionmaking process regarding participation. The earlier in the dispute process that the parties are made aware of the mediation option and are exposed to a potentially empowering encounter with a program mediator, the more likely it is that the mediation program will prove useful in the dispute resolution process. So again, consistent with the Relational view of the active role to be played by social institutions, program policy could support the goal of public education while maintaining respect for individual decisionmaking via a minimal timing mandate (e.g., requiring attendance at an informational session and scheduling a brief initial meeting with the mediator within thirty to ninety days of filing responsive pleadings).

#### *E. Informing Parties About Mediation*

Mediation programs typically rely on court personnel or attorneys in the jurisdiction to educate parties regarding mediation and other ADR options.<sup>148</sup> In the lawyer-as-educator approach, the accuracy and enthusiasm with which mediation is described to potential participants depends on the knowledge and attitudes of individual attorneys in the jurisdiction.<sup>149</sup> Transformative mediation is likely to differ from the directive, problem-solving approach that both the public and practicing attorneys expect from a mediation process.<sup>150</sup> This suggests that it would be important, especially in its early implementation stages, for such a program to exercise a high degree of control over party education in order to convey

---

<sup>148</sup> See *id.* § 6:06.

<sup>149</sup> See *id.*

<sup>150</sup> See BUSH & FOLGER, *supra* note 1, at 271-284.

## HABITS OF HIGHLY EFFECTIVE TRANSFORMATIVE MEDIATION

accurate information to potential participants. Mediators, or other trained court personnel, would be the most likely candidates to conduct general information sessions. These sessions could be used to educate parties about the mediation program only. However, if other ADR options are available, these should be discussed as well, in order to better enable parties to make fully informed decisions regarding participation.

The suggestion that a transformative program take a “court-educator” approach, rather than a “lawyer-instructor” approach<sup>151</sup> points to the need for proactivity in educating the local bar as to the premises, goals and expected outcomes of transformative mediation for the parties. Because parties are likely to discuss mediation with their attorneys and perhaps even request attorney participation in mediation sessions, it is key to the program’s acceptance by parties that attorneys are aware of the reasons behind the program’s nondirective approach and its potential benefits. Options for educating the local bar include requiring each attorney practicing before the court to attend an informational session, requiring attorney participation in the single mandatory meeting between the parties and a mediator or offering continuing education credits for more in-depth seminars concerning transformative mediation processes.

### *F. Determining Session Participants*

Because mediation assumes party participation and control, nearly all mediation programs require the presence of the parties in mediation sessions, or at the very least the presence of a representative with settlement authority via telephone.<sup>152</sup> Likewise, in a transformative mediation program, where the main goal is to help parties grow via an empowering experience, party participation would be key to the success of the mediation experience.

But beyond the parties themselves, who should be allowed to participate in mediation sessions? For example, in a dispute between neighbors should one or both parties be permitted to bring witnesses to an argument?<sup>153</sup> Should parties to this or other types of disputes be permitted to invite their attorneys to attend the mediation sessions?<sup>154</sup> Mediation

---

<sup>151</sup> See ROGERS & MCEWEN, *supra* note 96, § 6:06.

<sup>152</sup> See *id.* § 6:07.

<sup>153</sup> See BUSH & FOLGER, *supra* note 1, at 115–117.

<sup>154</sup> See McEwen et al., *supra* note 134, at 1375–1376 (arguing that parties should be encouraged to ask attorneys to participate).

statutes answer this last question in various ways.<sup>155</sup> While some jurisdictions prohibit or otherwise limit attorney attendance in mediation sessions, some require attorney participation.<sup>156</sup> These varied approaches reflect different concerns. Concerns about the fairness of an informal process such as mediation lead some to advocate attorney participation, particularly where there are bargaining imbalances between parties.<sup>157</sup> On the other hand, concerns about increased costs to parties and potential disruption of mediation's conciliatory atmosphere by the adversarial behavior of attorneys lead others to advocate barring attorney participation.<sup>158</sup>

In light of the party empowerment theme of transformative mediation, Bush and Folger argue that the decision concerning who, in addition to the parties themselves, should be permitted to participate in any given mediation should rest with the parties themselves.<sup>159</sup> If the parties disagree concerning the participants that the other party proposes to invite to the sessions, the discussion of that disagreement must be the first order of business in the mediation. If the parties cannot come to an agreement on that issue, they should be encouraged to make a choice concerning continued participation.<sup>160</sup> Bush and Folger argue that if this decision is made by the mediator (for example, by excluding one party's attorney because the other party is unrepresented), the mediation fails to empower the parties concerning their own decisionmaking capabilities and "in fact disempowers the parties" by setting up the expectation that the power lies with the mediator to determine whose input is relevant to the resolution of the issue.<sup>161</sup>

If party empowerment is fostered when mediators encourage parties to decide who should participate in mediation sessions, then it follows that if either the enabling legislation or program policies limit the parties' choices as to who, in addition to themselves, can potentially participate in

---

<sup>155</sup> See ROGERS & MCEWEN, *supra* note 96, § 6:07.

<sup>156</sup> See *id.*

<sup>157</sup> See McEwen et al., *supra* note 134, at 1375-1376.

<sup>158</sup> See ROGERS & MCEWEN, *supra* note 96, § 6:07; Lande, *supra* note 8, at 879-891 (noting that the participation of lawyers in mediation may reduce the quality of the parties' consent unless mediators are able to handle the time pressures generated by lawyers' hourly fees and tight schedules).

<sup>159</sup> See BUSH & FOLGER, *supra* note 1, at 116.

<sup>160</sup> See *id.*

<sup>161</sup> *Id.*

## HABITS OF HIGHLY EFFECTIVE TRANSFORMATIVE MEDIATION

mediation sessions, the program itself will serve as a disempowering force.<sup>162</sup> If policymakers and program planners accept these propositions, then enabling legislation should not place limits on this choice, and program policies should be designed to support mediators in the practice of encouraging parties to make this choice. Program policy could, for example, explicitly vest this choice in the parties and, perhaps, explicitly vest in the mediator the responsibility for seeing that the issue is raised in initial discussions with the parties (if it is not raised by the parties themselves).

### G. Assessment

Several state mediation statutes currently require assessment of mediation programs.<sup>163</sup> Program evaluation and monitoring are essential if program administrators and policymakers are to understand the impact of mediation programs on the court system and on the parties involved.<sup>164</sup> Program evaluation is a periodic assessment of overall program effectiveness. It is typically conducted by independent evaluators,<sup>165</sup> ideally utilizing an experimental research design.<sup>166</sup> Program monitoring, in contrast, is the ongoing process of data-gathering that allows program administrators to oversee the quality of the program and to provide guidance to mediators.<sup>167</sup>

The design of program evaluation and monitoring systems is yet another opportunity for a mediation program to either support mediators in the provision of nondirective transformative mediation services or to undermine that effort. Currently, many jurisdictions define program success in terms of efficiency—increased settlement rates, lowered costs and reduced court docket backlog.<sup>168</sup> For programs where success is defined as efficiency, monitoring programs would gather primarily time and cost-related data such as settlement rates, amount of mediator time devoted to each case and costs to both the court and to the parties for each

---

<sup>162</sup> See *id.* at 115–116.

<sup>163</sup> See ROGERS & MCEWEN, *supra* note 96, § 6:14.

<sup>164</sup> See *id.*

<sup>165</sup> See *id.* § 6:17.

<sup>166</sup> See *id.* § 6:16.

<sup>167</sup> See *id.* § 6:14.

<sup>168</sup> See *id.* § 6:15.

dispute.<sup>169</sup> Much of this data would likely be recorded by mediators themselves as part of summary sheets used to document and close each case file.

Efficiency data can be a strong weapon in the program administrator's fight for continued funding. However, gathering this type of information sends a strong message to mediators that they are successful when they produce settlements quickly. Measuring success in this way provides a strong incentive for mediators to use a directive mediation style in an attempt to increase settlement rates and thereby improve their own rates of success.<sup>170</sup>

To support transformative mediators in the effort to be nondirective and remain focused on party autonomy, the periodic evaluations and ongoing monitoring systems for a transformative mediation program must measure success in terms of transformative goals. Data related to program costs should, of course, continue to be gathered to support reasoned policy decisions based on cost-benefit analysis. However, the criteria for success on the benefit side of that analysis must be widened beyond the benefit of higher settlement rates.<sup>171</sup>

Where the stated goals of a program are party empowerment and recognition, assessment studies and monitoring systems must be designed to measure success in those areas. For example, rather than asking only that mediators document the amount of time spent on each case and report whether or not parties ultimately settled their dispute before withdrawing from mediation, monitoring systems should track the next step in the litigation process for all participants.<sup>172</sup> For some there will be settlement and, therefore, no next step. For others, however, there may be use of a

---

<sup>169</sup> See *id.*

<sup>170</sup> See *id.* § 6:16.

<sup>171</sup> See *id.* § 6:19.

Of course, if transformative mediation is advocated on grounds such as [promoting the parties' greater understanding of their own needs and options, and of the other party], new research models and evaluation measures must be developed to test its claims. Research needs to look beyond numerical settlement rates, develop more reliable and focused indicators of party satisfaction, and track the subsequent history of both settled and nonsettled cases. The current lack of such data is only a temporary problem. If users are interested in this information, it is likely that researchers will find ways of obtaining it.

BUSH & FOLGER, *supra* note 1, at 274-275.

<sup>172</sup> See BUSH & FOLGER, *supra* note 1, at 274.

## HABITS OF HIGHLY EFFECTIVE TRANSFORMATIVE MEDIATION

more directive ADR procedure such as med-arb or perhaps lawyer-to-lawyer negotiation. It may be that the benefit of transformative mediation is not in immediate settlement, but in an increased trust level that allows parties to benefit from other dispute resolution options short of trial.<sup>173</sup> But this hypothesis cannot be explored unless the question driving data-gathering is widened beyond whether or not settlement took place during mediation.<sup>174</sup>

Evaluation and monitoring of empowerment and recognition would, of course, be strongly focused on gathering information directly from program participants regarding their impressions of the mediation process itself and their level of satisfaction with the outcome.<sup>175</sup> Pre- and post-mediation questionnaires completed by the parties could be utilized to capture data concerning the extent to which parties experienced empowerment and recognition. The questions could, for example, be designed to elicit information indicative of the parties' confidence in their ability to problem-solve and willingness to understand the other party's point-of-view. A comparison of pre- and post-mediation responses would be indicative of movement in the areas of empowerment and recognition.

Parties must also be questioned about their impressions of the mediator and the outcome of the mediation. These questions should be designed to capture information about the extent to which the parties felt supported by the mediator and the extent to which they viewed the outcome as a result of their own decisionmaking as opposed to forced acquiescence to the mediator or to the other party. These questions serve both to measure program progress in meeting its stated goals of empowerment and recognition and to reinforce to program mediators that their success is defined in terms of party satisfaction (the quality of the outcome in terms of empowerment and recognition rather than only the quantity of settlements).

Once gathered and interpreted, this data must be used as feedback to improve the mediation program.<sup>176</sup> For example, the message that mediator success is tied to party empowerment and recognition can be further reinforced if mediators are rewarded according to these same criteria. For mediators employed by the court, this could translate into merit raises or bonuses based on measures of party satisfaction rather than on settlement

---

<sup>173</sup> See *id.* at 200–201.

<sup>174</sup> See ROGERS & MCEWEN, *supra* note 96, § 6:19.

<sup>175</sup> See *id.* §6:18.

<sup>176</sup> “Too many programs collect but fail to utilize data and others fail to integrate the monitoring data into administrative decisions.” *Id.*

rates. For mediators in private practice, it could mean increased referrals for those mediators scoring high in party satisfaction measures.<sup>177</sup>

#### IV. CONCLUSION

Linking mediator compensation, or referrals, to party empowerment and recognition brings the transformative mediation program full circle by tying rewards directly to attainment of program goals. In this way, an institutional context can be constructed to support the provision of transformative mediation. This Note presents a very brief overview of some of the many policy decisions that must be made when designing a court-connected mediation program. Other decisions not discussed here include funding,<sup>178</sup> staffing the program<sup>179</sup> and training transformative mediators. Like the other design choices discussed above, these choices must be made based upon a full understanding of the goals and processes of transformative mediation as well as the institutional dynamics that can either support or undermine transformative mediators in their attempt to remain focused on party empowerment and recognition.

The problem-solving approach to mediation currently has a strong hold on mediators trained in problem-solving mediation techniques and over policymakers who often approve and fund mediation programs based on reports of settlement rates and other efficiency measures.<sup>180</sup> In an institutional setting that remains oriented to the problem-solving approach, transformative mediation will not get a fair chance to prove its merits. To give transformative mediation this chance, transformative mediators must not only be trained to think and behave according to relational values, they must also operate in a system that fully supports their efforts. As Covey reminds us "[s]o often the problem is in the system, not in the people. If you put good people in bad systems, you get bad results. You have to water the flowers you want to grow."<sup>181</sup>

---

<sup>177</sup> See COVEY, *supra* note 5, at 232 (giving an example of changing the negative behavior of a high-producing, yet interpersonally disruptive, manager by tying part of compensation to leadership and team building efforts).

<sup>178</sup> See ROGERS & MCEWEN, *supra* note 96, § 6:13.

<sup>179</sup> Staffing decisions include whether to use paid or volunteer mediators and, if using paid mediators, whether to put mediators on the court payroll or refer to mediators in private practice. See *id.* § 6:12.

<sup>180</sup> See BUSH & FOLGER, *supra* note 1, at 55-63; *id.* § 2:03.

<sup>181</sup> COVEY, *supra* note 5, at 232.